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No. 79-1973

In the Supreme Court of the United States

OCTOBER TERM, 1979

MOLLY MURPHY'S, INC. and
MOLLY MURPHY'S CLUB, INC.,
Petitioners,

VERSUS

RONALD N. MASTERS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July, 1980

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Respondent is satisfied with the presentation by Petitioners as to opinions below and jurisdiction and, therefore, declines to comment thereon.

QUESTIONS PRESENTED

Although Respondent generally agrees that the statements, contained in Petitioners' Petition for Writ of Certiorari under questions presented, fairly represent the nature of the litigation and its outcome in the District Court and Court of Appeals, Respondent is dissatisfied with the presentation of the questions presented.

The issues presented by the Petitioners and Respondent in their respective Briefs to the Court of Appeals were confined solely to two issues, the first of which dealt with whether the trial court erred in directing a verdict for

Respondent Masters and entering judgment accordingly, and the second with the trial court's action in dismissing and directing a verdict in favor of Respondent Masters on Petitioners' counterclaim, which issue is not pertinent to this Petition.

Respondent respectfully submits that Question 1 posed by Petitioners was not clearly advanced to the Court of Appeals in the parties' briefs in chief, but was first raised in the Petition for Rehearing of Petitioners. Further, that Question 2 posed by Petitioners manifests Petitioners were denied their right to trial by jury, which was not the case. To the contrary, all evidence and testimony was presented to a jury and, upon both parties resting, the District Court directed a verdict in favor of Respondent as a result of Petitioners' evidence failing to support all of the essential elements necessary to prove fraud under the well-established law of the State of Oklahoma. Likewise, Respondent believes that Question 3 as proposed by Petitioners is not fairly stated, since the Court of Appeals, in affirming the District Court and denying rehearing, followed the Statutes and well-established case law of the State of Oklahoma, and did not depart from the accepted and usual course of judicial proceedings.

In Respondents' judgment, the only issue which could be presented by this Petition, fairly stated, is: Whether the Court of Appeals' affirmance of the District Court's action in directing a verdict in favor of Respondent, based on a finding that the evidence of Petitioners failed to establish all essential elements to prove fraud under the laws of the State of Oklahoma, has so far departed from the accepted and usual course of judicial proceedings, or

so far sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision pursuant to U.S. Sup. Ct. Rule 19.1(b), 28 U.S.C.A.

STATUTES, FEDERAL RULES AND REGULATION INVOLVED

Respondent is dissatisfied with Petitioners' presentation of Statutes, Federal Rules and Regulations involved in this Petition, since the Statutes set forth in the Petition were not relied upon in the Briefs in Chief of the parties presented to the Court of Appeals, but were first raised by Petitioners in their Petition for Rehearing.

This Petition involves no Federal Statutes, Rules or Regulations, but is confined solely to the well-established Statutes and case law of the State of Oklahoma relating to the essential elements necessary in order to prove actionable fraud, as it relates to rescission of a contract under the terms of 15 O.S. (1971) § 233, which provides in part:

> "A party to a contract may rescind the same in the following cases only: (1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party."

STATEMENT OF CASE

Petitioners' only defense pertinent to this Petition to Respondent's action to enforce the written contract between the parties relating to payment for services rendered was based on allegations of fraud in the inducement, which allegations were specifically denied by Respondent. Under the undisputed law of Oklahoma, as cited in both Petitioners' and Respondent's Briefs in Chief to the Court of Appeals, to constitute actionable fraud, it must be made to appear: (1) That a material representation was made; (2) that it was false; (3) that the party making the representation knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that it was made with the intention that it should be acted upon by the other party; (5) that the other party acted in reliance upon it; (6) that such party thereby suffered injury, and (7) that all of the elements must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any of them being fatal to recovery.

Both the District Court, after hearing all of the testimony and evidence, and the Appeals Court, after reviewing the transcript of the trial, and having benefit of oral argument, both found that Petitioners' evidence, with logical inferences to be drawn therefrom, was wholly insufficient to establish all elements necessary to prove fraud and, thus, support a jury verdict in favor of Petitioners. Accordingly, the trial court properly sustained the Respondent's Motion for Directed Verdict.

Although the excerpts from the testimony of Petitioners' witness, Robert L. Tayar, set forth in Petitioners' Statement of Case, does appear in the trial transcript where indicated, it was presented, in the opinion of Respondent and, we believe, the opinion of the trial court and Court of Appeals, not for the purpose of establishing damages, as Petitioners assert, but merely to reflect upon Respondent's qualifications and as to whether he, in fact, had held himself out to be an architect.

The trial court and Court of Appeals each placed great. emphasis on the following testimony by Petitioners' same witness, Robert L. Tayar:

> "THE COURT: Counsel, I don't know the purpose of all this cross examination. As I understand it, and you correct me if I am wrong, but you say it's invalid because he held himself out to be an architect and he wasn't?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: That's the reason you say the contract is no longer binding?
>
> THE WITNESS: That's right.
>
> THE COURT: That's the only reason, as I understand it.
>
> THE WITNESS: Yes, sir.
>
> THE COURT: Because he was not an architect when he said he was." (Trial Transcript p. 263, lines 10 to 22.)

Under the uncontested Oklahoma law, a person is not required to be an architect to perform the services undertaken by Respondent in the written contract sued upon.

Respondent's position is clearly supported by the following comments made by the trial Judge in directing the verdict in favor of Respondent:

> "Now, if there had been something wrong with the plans, if the roof would have leaked or caved in during the snow, or something like that, we would have a different matter, or maybe void the contract, or other things could have arisen which, apparently, did not, that may have entitled the defendant to void this contract, but they seek to recover, and I asked Mr. Tayar specifically for the bases, and he said, 'Well, the only reason we want to void the contract is because he wasn't an architect'. True, there is evidence that it cost—the building cost more, the interior decoration cost more than was estimated, that is not asserted either in the pleadings or the testimony as any grounds for rescinding the agreement. Therefore, I hold as a matter of law that the agreement must be enforced." (Trial Transcript p. 275, Lines 9 to 23.)

REASONS WHY THE WRIT SHOULD BE DENIED

The Petitioners' writ should be denied, since the Petition wholly fails to show there are any special and important reasons for the granting thereof, within U. S. Sup. Ct. Rule 19, 28 U.S.C., or otherwise.

ARGUMENT

QUESTION NO. 1

The Petitioners' testimony and evidence offered during the trial of the issues to the District Court failed to prove all essential elements necessary to establish actionable fraud under the undisputed law of the State of Oklahoma, and the absence of any one element is fatal to recovery. *Ramsey* v. *Fowler,* 308 P.2d 654 (Okla. 1957). *Steiger* v. *Commerce Acceptance of Oklahoma City, Inc.,* 455 P.2d 81 (Okla. 1969); *Bridges* v. *Bridges,* 544 P.2d 493 (Okla. 1975).

Since the petitioners failed to offer evidence which, with logical inferences to be drawn therefrom, was sufficient to support a verdict for the petitioners, there was nothing to submit to the jury, and the District Court properly sustained a Motion for Directed Verdict in favor of Respondent. *Stieger* v. *Commerce Acceptance of Oklahoma City, Inc., supra.*

QUESTION NO. 2

In the absence of testimony or evidence supporting all or any one of the essential elements of fraud, as required to be established under the Oklahoma law, Petitioners had no right for submission of the case to a jury on such issue, and a directed verdict by the trial court was proper under the circumstances. *Yazzie* v. *Sullivent,* 561 F.2d 183 (10th Cir. 1977); *Black, Silvals and Bryson, Inc.* v. *Keystone Steel Fab.,* 584 F.2d 946 (10th Cir. 1978).

QUESTION NO. 3

The Petitioners present no authorities to support the proposition that the decision of the trial court and of the Court of Appeals affirming the same and denying rehearing were clearly erroneous and, in any manner, sanctioned an unauthorized and blatant departure from the accepted and unusual course of judicial proceedings. To the contrary, the record clearly reflects both the trial court and the Court of Appeals steadfastly applied the clearly established laws of the State of Oklahoma in the accepted and usual course of these judicial proceedings, and sanctioned no departure therefrom which would call for this Honorable Court to exercise its powers of supervision by granting Petitioners' writ.

Respondent further respectfully submits this Petition appears to be frivolous and filed merely for purposes of delaying Respondent from recovering monies lawfully due him under the judgment of the District Court; that Petitioners, in order to supersede execution on the judgment of the District Court, have assigned to the District Court Clerk Certificates of Deposit, some of which are earning interest in excess of the interest accruing on Respondent's judgment herein, thus resulting in additional pecuniary gain to Petitioners, to the detriment of Respondent. That, under U.S. Sup. Ct. Rule 56, 28 U.S.C., there appearing to be no grounds for the granting of this Petition, Respondent should recover reasonable damages for his delay.

CONCLUSION

Petitioners have been denied no fundamenntal legal right, either under State or Federal law, nor have they presented any special or important reasons under U.S. Sup. Ct. Rule 19, 28 U.S.C., or otherwise, to require this Court to exercise its power of supervision and grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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July, 1980

CERTIFICATE OF SERVICE

I, Joe S. Rolston III, attorney for Ronald M. Masters, Respondent, hereby certify that on the ____ day of July, 1980, I served a copy of the foregoing Brief of the Respondent in Opposition to Petition for Writ of Certiorari on Molly Murphy's, Inc. and Molly Murphy's Club, Inc., the Petitioners herein, by mailing three copies in a duly addressed envelope, with first class postage prepaid thereon, to: Kent F. Frates, Attorney of Record for Petitioners, at Suite 1250, 101 Park Avenue Building, Oklahoma City, Oklahoma 73102, and to William B. Rogers, Co-Counsel for Petitioners, at 219 Couch Drive, Oklahoma City, Oklahoma 73102.

JOE S. ROLSTON III